

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

EARL L. HOFFMAN)	
Claimant)	
)	
VS.)	
)	
FREUND INVESTMENT INC.)	
Respondent)	Docket No. 1,021,845
)	
AND)	
)	
KANSAS BUILDING INDUSTRY)	
WORKERS COMPENSATION FUND)	
Insurance Carrier)	

ORDER

Claimant requested review of the November 27, 2006, Award entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on March 6, 2007.

APPEARANCES

Lawrence M. Gurney, of Wichita, Kansas, appeared for claimant. Roy T. Artman, of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found that claimant did not give respondent timely notice of his accidents that occurred on November 18, 2004; December 12, 2004; and January 12, 2005, nor did he establish just cause for his failure to give timely notice so as to enlarge the notice period to 75 days. The ALJ also found that claimant failed to sustain his burden of proving that he suffered personal injury by accident on January 12,

2005.¹ In regard to claimant's claimed series of accidents ending May 20, 2005,² the ALJ ruled that claimant failed to sustain his burden of proof that he had permanently aggravated injuries suffered before January 18, 2005, as a result of work activities performed thereafter. Accordingly, the ALJ denied claimant's application for workers compensation benefits.

Claimant requests review of the ALJ's findings that there was no just cause to extend the 10-day notice periods in regard to his accidents of November 18, 2004; December 12, 2004; and January 12, 2005. Claimant believed he was not seriously injured and that he could work through the symptoms. As he continued to work and with the cumulative effects of the later accidents, claimant concluded he needed medical attention. Claimant requests that the Board find that there was just cause to extend the notice deadline. Claimant contends, in the alternative, that the ALJ erred in concluding that claimant's impairment was from injuries suffered before January 18, 2005, and not from his continued work activity with respondent. Claimant admits he suffered distinct events but argues that his continuing work activity gradually aggravated his condition. Claimant argues that Dr. C. Rieff Brown's testimony supports a conclusion that his continuing work activity is the source of his need for treatment and for his impairment.

Respondent requests that the Board affirm the ALJ's Award in its entirety. During oral argument to the Board, respondent admitted that claimant's injuries arose out of and in the course of his employment, but respondent argues that claimant failed to provide timely notice of the November 18, 2004, December 12, 2004, and January 12, 2005, accidents. With regard to claimant's claimed series of accidents ending May 18, 2005, respondent disputes that claimant proved any permanency and, therefore, the nature and extent of claimant's impairment is an issue. Respondent does not dispute claimant's entitlement to the past medical treatment benefits, including the surgery, and asks that the award of those benefits be affirmed as well.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

¹ The Award lists claimant's claimed fall in January 2005 to be January 12, 2005, on pages 1 through 4. Thereafter, the Award sets out a date of accident in January 2005 to be January 17, 2005.

² The P.H. Trans (June 2, 2005) at 11 and 26, and the R.H. Trans. at 5, 6, and 22 refer to May 20, 2005, as the ending date of the series of accidents, but the discovery deposition of claimant (May 23, 2005) at 11, 20, indicates that claimant did not work on May 19 or May 20, the Thursday and Friday before his deposition, making his last day worked May 18, 2005.

Respondent is a business that encompasses new home construction, light residential remodeling, light commercial remodeling, and custom homes. Claimant began working for respondent as a foreman and framer on October 20, 1991. His job as a framer included building walls, laying decks and joists, setting trusses, putting up siding, roofing, and doing concrete work. He was also foreman of a crew.

Claimant's Application for Hearing listed an injury on "[a]pproximately November 18, 2004 and each and every working day thereafter with an aggravation injury on February 21, 2005."³ This Application for Hearing was amended to list a date of accident of "[a]pproximately November 18, 2004 and each and every working day thereafter with an aggravation injury on January 12, 2005."⁴ Claimant is claiming three specific dates of accident: November 18, 2004, December 12, 2004, and January 12, 2005. He is also claiming a series of accidents from November 18, 2004, until his last day worked, which was May 18, 2005.

Claimant testified that on November 18, 2004, he was standing on the top of some roof trusses when he slipped and fell. After falling five to six feet, he grabbed a truss with his left hand and climbed back on top of the trusses. Claimant said about three other people were present when he fell, including his son. Claimant injured his left shoulder, left arm, and back. He finished out the day and did not miss any time from work as a result of the accident. He did not report the injury to his supervisor. He did not seek medical treatment because he thought the pain would go away. The pain in claimant's back went away shortly, and the forearm was just bruised. But the pain in claimant's shoulder continued.

On December 12, 2004,⁵ claimant was hanging soffit. As he was walking around the building carrying a flat bar, he tripped and fell, hitting his left shoulder. Although he had pain in his left shoulder, he continued to work after that fall and again did not report it to his supervisor. On January 12, 2005, claimant was running mud sill on a foundation when he again tripped and fell onto his left shoulder. After this fall, he had pain in his shoulder and also noticed that he had some numbness in his left thumb. He did not immediately report the fall to his supervisor.

³ Form K-WC E-1, Application for Hearing filed March 23, 2005.

⁴ Form K-WC E-1, amended Application for Hearing filed May 25, 2005.

⁵ In claimant's discovery deposition taken May 23, 2005, he testified that this second injury occurred about two weeks after the fall from the trusses, making it the first week of December. At the Preliminary Hearing held June 2, 2005, he testified that the accident occurred sometime around December 3, 10 or 12. The ALJ requested a specific date to use as a date of accident, and claimant's attorney stated he would use December 12, 2004.

By February 1, 2005, claimant's pain was getting worse, and he talked to Rose Freund. Although claimant stated he verbally told Ms. Freund about all three falls, a written statement identified as being written by claimant dated February 3, 2005, only mentions his falls in November and December 2004.

Claimant requested medical treatment, and Ms. Freund sent him to the Hutchinson Clinic. Claimant was seen on February 2, 2005, by Dr. Daniel Lygrisse. X-rays were taken of the left shoulder and left hand. Dr. Lygrisse diagnosed him with a contusion injury of the left shoulder with paresthesia of the left hand. However, Dr. Lygrisse stated that etiology was undetermined and he was not sure whether either claimant's shoulder injury or thumb injury was related to his work. On February 14, 2005, claimant was again seen at the Hutchinson Clinic, this time by Dr. Christopher Rodgers. Claimant complained he continued to have a sharp, lancinating sudden pain deep in his left deltoid area with certain movement, including overhead movements, along with decreased strength in his left arm. Dr. Rodgers recommended an MRI of the left shoulder and limited claimant to no overhead lifting. The MRI was not done, however, because respondent denied claimant's claim.

Claimant was sent to Dr. J. Mark Melhorn for an independent medical examination (IME) ordered by the ALJ, after which Dr. Melhorn was authorized to provide treatment for claimant. Claimant was treated by Dr. Melhorn for about a year and had surgery to repair a rotator cuff tear in November 2005. Claimant was released from treatment as being at maximum medical improvement on February 7, 2006.

Claimant now works for Strawn Construction (Strawn) doing essentially the same work as he did for respondent. He stated he earns a comparable wage. He continues to have pain in his left shoulder and has trouble doing some of the work at Strawn. He has trouble working above his head and tries to stay away from that type of work. He still has weakness in his left arm and shoulder. He has not had a new injury or accident while working for Strawn.

Ms. Freund is the president of respondent. She was first notified by claimant about problems with his shoulder on February 1, 2005. Claimant came to her office and said he had been hurt on the job and he had a problem with his shoulder and his thumb. She authorized claimant to see a doctor at the Hutchinson Clinic. She said that claimant told her about the November 18, 2004, injury where he hurt his shoulder, but she did not file a claim for that because it was untimely. The only claim she filed and sent claimant to see the doctor for was the thumb injury.

Ms. Freund said that claimant had a previous work-related injury while working with respondent when he had injured his eye and was sent to a doctor. Also, in April 2005, claimant fell again, injuring his knee. That claim has been settled.

Claimant filed an Application for Preliminary Hearing on March 23, 2005. That preliminary hearing was held on June 2, 2005. After the hearing, the ALJ issued an order

denying claimant's requests relating to the alleged accident dates of November 18, 2004, December 12, 2004, and January 12, 2005, finding that claimant failed to sustain his burden of proof that timely notice of accidents was provided or that just cause existed to enlarge the notice period. Under a separate order, the ALJ referred claimant for an IME to determine a

diagnosis of [claimant's] left shoulder and left thumb complaints; recommendations for treatment; Claimant's ability to work and, if so, appropriate temporary work restrictions; whether Claimant's current complaints or presenting condition is causally related to Claimant's work duties for Respondent between February 1, 2005 and May.⁶

Claimant appealed the order denying benefits, requesting review of whether he sustained accidental injuries on November 18, 2004, December 12, 2004, January 12, 2005, or a series through at least February 1, 2005; whether proper notice was given within 10 days, and whether good cause existed to enlarge the notice period to 75 days. The ALJ's Order was affirmed by one member of the Board.⁷

Dr. Melhorn examined claimant pursuant to the ALJ's order on June 21, 2005. Claimant complained of problems in his left thumb and left shoulder. He described to Dr. Melhorn the accident of November 18, 2004, when he fell through the trusses and reached out with his left hand and grabbed a truss to keep from falling. He told Dr. Melhorn that since then, he has had increasing pain and discomfort in his left thumb and hand into the left shoulder area. Claimant also reported falls on December 12, 2004, and February 1, 2005⁸, when he tripped and fell on his outstretched left hand. After the February 1 fall, he returned to his regular work but was accommodated until May 18, 2005, when he was laid off by respondent.

After the examination, Dr. Melhorn diagnosed claimant with left thumb CMC arthrosis; left shoulder impingement, rotator cuff; AC arthritis, right and left shoulder; and cervical spine arthritis, age related, at C4-5. Dr. Melhorn suggested claimant have an MRI of the left shoulder for further evaluation and, based upon the results of the MRI, stated that medical management may be appropriate. Dr. Melhorn further stated: "It would appear that Mr. Hoffman's current symptoms are related, or aggravated by the traumatic event as described with regard to the injuries of 11/18/04, 12/12/04 and 2/1/05."⁹

⁶ ALJ Order (June 2, 2005) at 1.

⁷ *Hoffman v. Freund Investment Inc.*, No. 1,021,845, 2005 WL 1983425 (Kan. WCAB July 28, 2005).

⁸ Although Dr. Melhorn's report sets out a date of accident of February 1, 2005, that accident occurred on January 12, 2005.

⁹ IME report of Dr. J. Mark Melhorn, filed July 8, 2005, at 5.

Claimant told Dr. Melhorn that he had been able to perform his regular work activities by limiting hand-over-shoulder work with regard to the left and having coworkers assist with heavier lifting. Dr. Melhorn stated that it would be reasonable for claimant to continue that work status.

In a letter from the ALJ to counsel for the parties, the ALJ stated that he was unable to conclude from Dr. Melhorn's IME report what additional injury, if any, claimant suffered after February 1, 2005. Since the ALJ had previously denied compensability to claimant for injuries before February 1, 2005, he did not rule on claimant's requests for medical treatment. He advised the parties that, upon written application, he would defer making a ruling until Dr. Melhorn's report could be clarified or his deposition taken.¹⁰

The deposition of Dr. Melhorn was taken, and he testified that he found claimant had a painful left shoulder and a history of a fall with regard to the left shoulder landing on an outstretched left hand. Claimant's clinical examination was consistent with a shoulder impingement and/or rotator cuff changes on the left. Dr. Melhorn believed that claimant more probably than not had an injury or aggravation to his left arm and shoulder that was consistent with an injury of November 18, 2004, and December 12, 2004. He also opined that claimant's continuing to work between February 1, 2005, and May 18, 2005, more likely than not aggravated that underlying condition.

Work activities claimant described to Dr. Melhorn were use of basic hand tools, skill saws, nail guns, and general carpentry work. Claimant told Dr. Melhorn that he went back to doing regular work after the February 1, 2005, injury but with accommodation. Dr. Melhorn stated that claimant indicated that as a foreman, if he had a job that required him to work hand over shoulder, he would modify the job or find someone else to do the job. Regardless of this accommodation, Dr. Melhorn believed that claimant's work activities would have aggravated his condition. Dr. Melhorn could not state, however, whether it was a temporary aggravation or a permanent aggravation.

Dr. C. Rieff Brown, a board certified orthopedic surgeon, examined claimant on March 17, 2006, at the request of his attorney. Claimant gave a history of his fall from the trusses on November 18, 2004. He told Dr. Brown he had severe pain in his left shoulder and thought he had sprained the shoulder joint. He sought no medical treatment and continued to work. Claimant said he had several instances in which he fell and broke his fall with his left hand. Claimant said each fall would temporarily increase his symptoms. Claimant described a second notable injury that occurred on February 21, 2005¹¹, when he again fell on his left outstretched arm and hand. Claimant told Dr. Brown that after that

¹⁰ ALJ's letter to counsel, Aug. 3, 2005.

¹¹ Claimant has amended his Application for Hearing to change a date of accident from February 21, 2005, to January 12, 2005. Claimant has not filed a claim for a specific date of accident of February 21, 2005, but has alleged a series of accidents that is inclusive of that date.

fall, his shoulder pain was bad enough that he went to the emergency room. X-rays were taken and claimant was sent to see the company doctor, Dr. Rodgers. Following that incident, claimant developed numbness involving the ulnar side of the left thumb.

Dr. Brown testified that there was no way to tell if claimant had any impairment to his left shoulder before the February 2005 fall because there were no medical records. Dr. Brown suspected that claimant had a mild rotator cuff sprain and tendinitis that continued along until it was boosted by the February 21, 2005, injury. Dr. Brown, however, could not assign a rating to the previous condition and said that any such rating would be speculative. It appears that Dr. Brown was given an inaccurate history about an accident occurring on February 21, 2005, followed by a trip to the emergency room. The event Dr. Brown understood to have occurred on February 21, 2005, was most likely claimant's fall on January 12, 2005, for which claimant eventually received medical treatment on February 2, 2005.

Claimant told Dr. Brown that he continues to have pain in the left shoulder most of the time. Reaching above shoulder level or at arm's reach produces pain, as does heavier activity. He said he is unable to elevate his left arm above shoulder level and continues to have numbness in his left thumb.

Dr. Brown's examination showed claimant had tenderness at the left shoulder but no inflammation or swelling. Crepitus could be palpated on active rotational movement of the shoulder. The acromial impingement sign was negative. Dr. Brown found weakness of abductor strength on manual muscle testing. There was complete sensory deficit in the longitudinal distribution on the radial side of claimant's left thumb.

Dr. Brown concluded that claimant suffered a rotator cuff injury and developed rotator cuff tendinitis and acromial impingement. After surgery, claimant had residual loss of range of motion, crepitus, weakness of abductor function, and discomfort. He also injured the digital nerve to the left thumb, resulting in complete sensory loss of a longitudinal nature on the radial aspect.

Using the *AMA Guides*,¹² Dr. Brown rated claimant with a 7 percent permanent partial impairment of function of the left upper extremity. Claimant had an additional 6 percent impairment of the left upper extremity on the basis of crepitus. Dr. Brown found an additional 10 percent impairment of the left upper extremity on the basis of weakness of abductor function, which value he adjusted for the possibility that strength may be regained in the future. Dr. Brown also rated claimant with a 10 percent permanent partial impairment of the left thumb based on the longitudinal sensory loss. Those values

¹² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

converted and combined for a 20 percent permanent partial impairment of the left upper extremity.

Dr. Brown recommended that claimant permanently avoid frequent use of the left hand above shoulder level, all lifting above shoulder level, and frequent reaching away from the body more than 18 inches.

K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The ALJ determined that

Claimant has failed to sustain his burden of proof that he gave timely notice of accidental injury as to any claimed accidents before January 18, 2005, and has failed to establish just cause for his failure to give timely notice so as to enlarge the notice period to seventy-five days. Claimant has also failed to sustain his burden of proof of personal injury by accident on January 17, 2005.¹³

Nevertheless, the ALJ authorized Dr. Melhorn to treat claimant's injuries because

[t]he only medical evidence before the court establishes that Claimant's continued work activity after February 1, 2005 caused or contributed to Claimant's shoulder discomfort, justifying a Preliminary Hearing Award of medical treatment. An issue remains, however, as to whether Claimant's work activity after February 1, 2005, caused additional impairment above and beyond that which existed prior to that date. If Claimant's functional impairment is entirely attributable to accidents for

¹³ ALJ Award at 7 (filed Nov. 27, 2006).

which he failed to give timely notice, he is entitled to no Award of functional impairment, as K.S.A. 44-520 bars those claims.¹⁴

As to whether the series of accidents caused or contributed to claimant's permanent impairment, the ALJ concluded:

As a result of Claimant's report of injury on or about February 1, 2005, and as Claimant continued to work for Respondent, Respondent was aware of and acknowledged notice of a claimed series of injuries attributable to continued work activities after that date. The only medical evidence presented fails to establish that Claimant suffered any additional permanent impairment as a result of work activities performed from and after February 1, 2005. Claimant has thus failed to sustain his burden of proof of impairment suffered as a result of a series of repetitive work activities after January 18, 2005.¹⁵

This begs the question, how did the series of accidents after February 1, 2005, cause or contribute to the need for medical treatment, *including surgery*, but not cause or contribute to claimant's permanent impairment? Could the surgery have been necessary because of only a temporary aggravation? Perhaps the ALJ did ultimately determine that the surgery was not related to the series of accidents, as the Award concludes with the language, "Claimant's Application for Workers Compensation Benefits is **CONSIDERED** but **DENIED**."¹⁶ This is a denial of all benefits, past and future. The confusion results from the body of the decision that reaffirms the Order for medical treatment and only disallows permanent disability compensation. Nevertheless, in its brief to the Board and during oral argument, respondent does not dispute claimant's entitlement to the past medical treatment, so that is not an issue.

The Board finds claimant established that just cause existed for his failure to report his accidents within ten days. Claimant works in the construction industry, where minor accidents and injuries are a common occurrence. It is not unusual with this type of heavy manual employment for workers to experience aches and pains. Claimant experienced several falls but thought he would heal and his pain would eventually go away. When some of his symptoms did not improve and began affecting his ability to do his job, claimant reported them to his supervisor and requested medical treatment. There was also an indication that claimant may have been reluctant to report his injuries because another employee had recently made a claim for an injury that the employer did not believe was work related. Given the circumstances and testimony in this case, the Board finds just cause for extending the time for giving notice. As claimant's notice of February 1, 2005,

¹⁴ *Id.* at 7-8.

¹⁵ *Id.* at 9.

¹⁶ *Id.* at 10.

was within 75 days of his accidents, claimant satisfied the requirements of K.S.A. 44-520. Accordingly, claimant is entitled to an award of workers compensation benefits, including medical treatment, past and future, and permanent partial disability compensation. The only opinion in the record concerning the percentage of claimant's permanent impairment is from Dr. Brown. The Board adopts Dr. Brown's rating of 20 percent to the left upper extremity at the level of the shoulder and concludes claimant's permanent partial disability resulting from his accidents that occurred November 18, 2004, through May 18, 2005, is 20 percent loss of use of the left upper extremity, including the shoulder.¹⁷

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated November 27, 2006, is reversed, and claimant is entitled to an award of 20 percent for his scheduled injury to the left shoulder.

Claimant is entitled to 45 weeks of permanent partial disability compensation, at the rate of \$381.92 per week, in the amount of \$17,186.40, for a 20 percent loss of use of the shoulder, making a total award of \$17,186.40.

IT IS SO ORDERED.

Dated this _____ day of March, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

¹⁷ K.S.A. 44-510(d)(a)(13).

DISSENT

The undersigned Board Members agree with the ALJ's determination that claimant failed to give timely notice of the accidents he suffered before January 18, 2005, and no just cause exists for extending the time for giving notice from 10 to 75 days. We would do so for the reasons stated in the Board's Order of July 28, 2005, and in the ALJ's Award. In addition, claimant's self-limited work activities after February 1, 2005, would not have significantly aggravated his condition. We would find that the claimant's permanent impairment is the direct and natural consequence of his accidents before January 18, 2005. Accordingly, all accidents are time barred, and an award of permanent partial disability compensation must be denied.

BOARD MEMBER

BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
Roy T. Artman, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge